IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 69

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, et al., *Appellants*,

v.

HARRISON MANN, et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF FOR APPELLEES MANN, STONE, WEBB AND DONOVAN

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Statement of the Case

The legislative power of Virginia is vested in a General Assembly composed of a House of Delegates of one hundred members and a Senate of forty members. The Constitution limits the size of the two Houses.[1] Reapportionment is required decennially.[2]

Although the Constitution does not forbid it, the counties

[1] Constitution of Virginia, Sections 41, 42.

[2] Constitution of Virginia, Section 43.

and cities have never been divided in the apportionment process. Flexibility has been achieved by the use of multi-member districts and "floater" members.

In 1950, Virginia had a population of 3,318,680. The ideal population per member of the House of Delegates was 33,187.

In 1952 the General Assembly adopted an apportionment plan, not here in question, under which the largest population represented by a delegate was 61,787 in the City of Alexandria; the smallest, 19,218 persons in Botetourt and Craig counties. (Pl. Ex. 17, R. 199, 201.) The disparity in the extreme of representation was slightly in excess of 3 to 1. In the Senate, the difference was roughly 2 to 1.

Because the population growth of the state was largely concentrated in the areas involved in this appeal plus the Richmond suburban area, the departure from ideal representation worsened until, following the 1960 census, the voting strength of a citizen of Botetourt and Craig counties exceeded that of Fairfax county by more than 7 to 1; the voters of Lee and Scott counties had six times the representation in the Senate of a voter of Fairfax or Falls Church. (R. 14, 15.)

Measured by the David method,[3] the vote of a citizen of Fairfax had an index value of .28 in the election of delegates. A vote cast by a resident of Botetourt county for a delegate had an index value of 1.98. (Pl. Ex. 1, R. 88.)

In January 1961, the Honorable J. Lindsay Almond, Jr., Governor of the Commonwealth of Virginia, appointed a commission on redistricting. (Pl. Ex. 2; R. 89.) The

[3] Professor Paul T. David, of the University of Virginia, has devised a formula whereby the actual population per representative is compared to the state average population per representative. He assumes that the value of a citizen's vote in a district which is the size of the state average population per representative is 1.00. Indices larger than 1.00 indicate over-representation and indices smaller than 1.00 indicate under-representation (Pl. Ex. 1, R. 87.)

Hoover Commission, as it became known, employed the assistance of the Bureau of Public Administration of the University of Virginia. On July 10, 1961, the Bureau submitted to the Commission a report discussing methods of legislative apportionment and the principles as applied to Virginia. The Bureau suggested to the Hoover Commission that districts should be, as nearly as practicable, equal in population, with the deviation from equality being in most cases no more than 15% and in no case beyond 25%. (Pl. Ex. 2; R. 96.) With its report the Bureau submitted two alternative plans for the apportionment of the House of Delegates and three alternative plans for the apportionment of the Senate. In formulating the plans, the Bureau followed the criteria which had been considered in previous apportionments. None of the ninety-eight counties or thirty-two independent cities was divided. The one hundred member constitutional limitation on the House of Delegates, and the forty member limitation on the Senate were followed. Only contiguous jurisdictions were included within multi-member districts.

Plan A, House of Delegates, as the Bureau labeled its first plan, had a maximum deviation from ideal of 17%; Plan A, Senate, a maximum varjation of 22%. Measured according to the David method the richest vote under Plan A, House of Delegates, was worth 1.17; the weakest had an index value of .83. (Pl. Ex 3; R 103) Plan B, House of Delegates accorded the most favored voter a ratio of 1.22, the weakest voter .61 (Pl. Ex 3; R119)

The principal difference was that in Plan A the Bureau took into consideration population, contiguity of territory and community of interest, without regard to the existing district boundaries. In Plan B the Bureau suggested that existing districts not grossly over-represented or under-

represented be left as they were. In other words, the element of political compromise was added to Plan B.

On November 15, 1961, the Hoover Commission filed its report recommending a plan of redistricting different from any of the plans submitted by the Bureau of Public Administration. Its plan, which contained more of the oil of political compromise, deviated still further from the ideal and accorded less representation to appellees. (Pl. Ex. 12; R.159)

At the 1962 regular session, the General Assembly brushed aside the Hoover Commission report and the plans prepared by the Bureau of Public Administration and re-enacted the 1952 statutes with a few patchwork changes. These are the Acts here complained of.

The 1962 Apportionment Acts compare with Plans A and B of the University of Virginia and the Hoover Commission Report as follows:

Jurisdiction	1952 Apportionment Acts	Plan A.	Plan B.	Hoover Commission	1962 Apportionment Acts
Arlington:					
Delegates	3	4	4	3	3
Senators	1	2	1	1½*	1
Fairfax:					
Delegates	2	7	5	4	3
Senators	1	3	3	2½*	2
Norfolk:					
Delegates	6	7	7	7	6
Senators	2	3	3	3	2

*Floater Senator proposed for Arlington and Fairfax.

The following tables, summarized from the District Court's opinion, (R. 62-64) graphically illustrate some of the most striking inequities in the 1962 Act:

House of Delegates

District	Population	Delegates	Population per Delegate
Arlington	**163,401**	**3**	**54,467**
Fairfax	**285,194**	**3**	**95,064**
Norfolk	**304,869**	**6**	**50,812**
Shenandoah	21,825	1	21,825
Wythe	21,975	1	21,975
Grayson	22,644	1	22,644
Bland	23,201	1	23,201
Loudoun	24,549	1	24,549
Gloucester	25,359	1	25,359
Franklin	25,925	1	25,925
Rockingham	52,401	2	26,200
Buckingham	26,385	1	26,385
Southampton	27,195	1	27,195
Pulaski	27,258	1	27,258
Charlotte	27,489	1	27,489
Alleghany	28,458	1	28,458
Greensville	28,566	1	28,566
Pittsylvania	58,296	2	29,148
Fluvanna	29,392	1	29,392
City of Charlottesville	29,427	1	29,427
Fauquier	29,434	1	29,434
City of Petersburg	58,933	2	29,466
Amelia	29,703	1	29,703

District	Senate Population	Senators	Population per Senator
Arlington	163,401	1	163,401
Fairfax	285,194	2	142,597
Norfolk	304,869	2	152,435
Brunswick Lunenburg Mecklenburg	61,730	1	61,730
Goochland Louisa Orange Spottsylvania City of Fredericksburg	62,523	1	62,523
Culpeper Fauquier Loudoun	63,703	1	63,703
Clarke Frederick Shenandoah City of Winchester	66,818	1	66,818
Halifax Charlotte Prince Edward City of South Boston	67,100	1	67,100
Dickenson Wise City of Norton	68,803	1	68,803
Bland Giles Pulaski Wythe	72,434	1	72,434
Greensville Prince George Surry Sussex Hopewell	72,951	1	72,951
Norfolk County City of South Norfolk (now City of Chesapeake)	73,647	1	73,647
Dinwiddie Nottoway City of Petersburg	74,074	1	74,074
Appomattox Buckingham Cumberland Powhatan Amherst Nelson Amelia	76,652	1	76,652

It will be noted that the smallest population per delegate was in Shenandoah county with 21,825 persons and a stable population. The largest population per delegate was in rapidly growing Fairfax county with a population of 95,064 per delegate. The difference between the value of a vote in Shenandoah county and the value of a vote in Fairfax by 1960 figures was 4.36 to 1.

The largest senatorial district is the City of Norfolk with 152,435 persons per senator. The smallest is Brunswick, Lunenburg and Mecklenburg counties with a population of 61,730. Again, the smaller district is in an area of stable population; the under-represented district is growing at a rapid rate. The disparity in the Senate from the largest to the smallest district according to 1960 figures was 2.65 to 1.

There was no evidence in the court below that the General Assembly took into consideration any factor other than those enumerated in the report of the Bureau of Public Administration of the University of Virginia: population, contiguity of territory, community of interest.

On April 9, 1962, appellees, voters and taxpayers of Arlington and Fairfax counties, filed suit in the United States District Court for the Eastern District of Virginia, (R.1) invoking the court's jurisdiction pursuant to 28 U.S.C. 1343 (3) and 42 U.S.C. 1983, 1988. Norfolk citizens were thereafter permitted to intervene. (R. 32) Following the introduction of evidence, argument and submission of briefs, the United States District Court held on November 28, 1962, that the Apportionment Acts adopted by the General Assembly at the 1962 session,[4] denied the appellees and persons similarly situated the equal protection of the law in violation of the Fourteenth Amendment. The defendant election officials were enjoined from proceeding

[4] Chapter 635 and Chapter 638, 1962 Acts of Assembly.

pursuant to the unconstitutional acts. The enforcement of the injunction was stayed until January 31, 1963, so that the General Assembly of Virginia might, if the Governor or the required number of members of the General Assembly were so advised, be called in special session to remedy the unconstitutional apportionment (R. 79). The order of November 28, 1962, was further stayed by this Court. Probable jurisdiction was noted on June 10, 1963.

ARGUMENT

I

The District Court was correct in ruling that the Virginia Apportionment Statutes deprive appellees of the equal protection of the laws.

Section One of the Fourteenth Amendment to the Constitution of the United States denies to any state the power to discriminate against any citizen. Appellees, who are residents of Fairfax county, have been given less than one-fourth the representation of citizens of Shenandoah county; less than one-fourth as much as citizens of the adjoining county of Loudoun. Appellees who reside in Arlington and Norfolk counties have suffered a similar debasement of their voting power.

There is no question but that the appellees have been accorded less than equal representation. There is no question but that the most seriously under-represented areas of the state, in which the appellees reside, are also the most rapidly growing areas of the State. The continued growth of the area means that the 4.36 to 1 disparity in voting strength in 1960 will become a 9 or 10 to 1 disparity by 1970. In 1950, the vote of a resident of Fairfax county was equal to a little less than one-half the vote of a citizen of Botetourt county. By 1960, the population of Fairfax

county had grown so rapidly, while Botetourt and Craig counties stood still, that a Fairfax county citizen's vote amounted to but one-seventh of that of a Botetourt citizen.

Appellants cannot argue that the appellees have been treated equally. The gist of their argument is that a 4.36 to 1 disparity in voting strength from one county to another is not the gross disproportion of representation mentioned in *Baker* v. *Carr*, 369 U.S. 186, and that Virginia's discrimination does not, therefore, offend the equal protection clause.

Of course, equality is reasonable equality. Mathematical equality is not possible. Some deviation from the ideal is necessary unless Virginia is redistricted without regard to county and city lines—something which the appellees have not contended should be done. The Bureau of Public Administration of the University of Virginia suggested that the maximum deviation should not exceed 25% and demonstrated that without transgressing the guide lines followed in the past, it is possible to construct a plan which deviates from the ideal no more than 17% in the House and 22% in the Senate. (Pl. Ex. 3, R. 103; Pl. Ex. 7, R. 134.) The Bureau's plan would accord relatively equal protection to the citizens of Arlington, Fairfax and Norfolk. The Bureau and the Hoover Commission constructed still two other plans considerably less discriminatory than the patchwork plan which was adopted by the legislature.

The concept of political equality—the idea of one person, one vote—upheld in *Gray* v. *Sanders*, 372 U.S. 368, is as much violated by giving one citizen 4.36 times the voting power of another citizen, as by the 19 to 1 disparity between the voting power of citizens in Tennessee prior to *Baker* v. *Carr*. The question is not how much other states have discriminated against their citizens in legislative apportionment, but whether the appellees, who reside in Arlington and Fairfax counties and the City of Norfolk

in the Commonwealth of Virginia, have been denied the equal protection of the laws. Virginia cannot absolve itself of its sins by casting stones at its neighbors.

Similarly, the argument of the Commonwealth that *Baker* v. *Carr* is not controlling in the present case because the appellees have not shown gross disparities between the voting strength of rural and urban areas is inapposite. The situation in Virginia is even more of a crazy quilt than that which existed in Tennessee, where at least it was apparent that the failure to reapportion was the result of rural agreement to deny an equal voice to urban voters. In Virginia there is no such logical explanation. Several cities are over-represented. Certain rural districts are under-represented. The General Assembly has allotted Loudoun county with a population of 24,549 a delegate by itself, giving Loudoun citizens an index value of 1.62. (Int. Ex. 1, R. 334.) It allotted adjacent Fairfax and Falls Church three delegates for a population of 285,194, producing an index value of .42—(R. 22, 333) a discrepancy of approximately 4 to 1 between neighboring suburban communities. Richmond and adjacent Henrico county with a population of 337,297 were given nine delegates (R. 23, 24) as compared with the three allotted Fairfax and Falls Church which are almost equal in population. (R. 22.) Adjacent rural senatorial districts in piedmont Virginia showed a population differential of almost 2 to 1.[5]

The appellants did not attempt to explain the gross disparities which exist between the various areas of the state of Virginia practically identically situated. They could not, for there was no explanation save the desire of the members of the legislature to maintain themselves in office.

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[5] Senate District 26, population 63,703; Senate District 28, population 111,059. (Def. Ex. 7, R. 279.)

II

When appellees showed the gross numerical disparity in voting strength, the burden shifted to the appellants to establish some rational basis for the disparity.

The District Court held that when the appellees proved the inequity of representation on the basis of population, the burden shifted to the appellants to introduce evidence which might explain the inequities.

Of course, as appellants argue, it is the rule that a classification having some reasonable basis does not offend the Equal Protection clause of the Fourteenth Amendment merely because it is not made with mathematical nicety or because in practice it results in some inequality. *Morey* v. *Dowd*, 354 U.S. 457, 463.

It is also true that ordinarily state legislation is presumed constitutional and a classification attacked as discriminatory will be upheld if any state of facts may reasonably justify it. However, in freedom of speech cases the rule has been otherwise. There, once the discrimination has been shown, the burden has been thrust upon the state. *Speicer* v. *Randall*, 357 U.S. 513, 526; *United States* v. *Caroline Products*, 304 U.S. 144.

In our society the right to vote is as fundamental as the right to speak. The idea of one man, one vote, is a cornerstone of representative democracy. Therefore, the same considerations which justify a lessening of the burden of a litigant in a freedom of speech case support the holding of the lower court and of the whole trend of the lower court decisions following *Baker* v. *Carr* that once a showing of gross disparity in voting strength has been shown, the state has the burden of proving the justification for the disparity. As suggested by *amici curiae*, the ultimate test is whether the defenses urged by the state justify the ra-

tionality of their apportionment plans. *Davis* v. *Synhorst*, 217 F. Supp. 492, 497 (S.D. Iowa 1963): "It has been widely accepted that proof of a very substantial disparity in representation is sufficient to establish a *prima facie* case of invidious discrimination." *Moss* v. *Burkhart*, 207 F. Supp. 885, 891 (W.D. Okla. 1962): "An actionable deprivation results only from an invidious discrimination—a disparity without rationality. It seems fair to say, however, that a disparity of 10 to 1 in voting strength between election districts makes out a *prima facie* case for invidious discrimination." *Thigpen* v. *Meyers*, 211 F. Sup. 826, 832 (W.D. Wash. 1962): "The population figures before us revealed existence of extreme and striking disparities in voting values as to both Houses of the State Legislature. These are of sufficient magnitude to rebut the presumption. Such being the case, the defendants have the burden to establish some rational basis for them. This they have failed to do." See also *Scholle* v. *Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962).

III

There is no merit in the argument that appellees are entitled to less representation because of their military population.

In attempting to justify the unequal treatment accorded citizens of Arlington, Fairfax and Norfolk, the appellants made a single argument. They introduced figures showing the military population of the three jurisdictions. They argued that the legislative could have disregarded the military population in these districts.

There was no evidence that the General Assembly did in fact deduct from population figures for the various jurisdictions the military personnel residing within their boundaries. The military figures adduced related only to the three jurisdictions, although there are many other military

bases in the state. Indeed, at the trial the Attorney General could not state the number of military personnel in the State of Virginia.

There was no suggestion that students at colleges, inmates of institutions or other persons temporarily resident and counted in a jurisdiction at the time of the census, (Def. Ex. 11, R. 316) were deducted from population figures of other political subdivisions in the state. There is no constitutional provision nor any statute which treats military personnel differently from other citizens. No evidence was introduced as to the proportion of military personnel resident in Arlington, Fairfax and Norfolk, who are permanent residents of the area and who vote there. The number of military—related persons cited by the appellants was arrived at by multiplying military personnel by two and one-half. There was no suggestion as to the origin of such a factor.

Since the state had no figures on total military population and no break down of military population in other political subdivisions of the state, it is apparent that the numbers of military—related personnel had nothing to do with apportionment. If such a deduction had been made in Arlington, Fairfax and Norfolk and not in the rest of the state, the discrimination would have been all the more invidious.

Even accepting the argument of appellants that the legislature might have deducted military related personnel resident in Arlington, Fairfax and Norfolk without making similar deductions of military personnel in other counties and cities, the discrimination was far more than a mathematical nicety. Appellants contend that after deducting military related personnel resident in Fairfax county, a resident of Shenandoah county would have a vote only 3.53 times the value of the vote of a citizen of Fair-

fax. No explanation was offered as to why, even had the legislature made a deduction of military—related personnel in Fairfax, the vote of a Shenandoah county resident should be worth more than 3½ times the vote of a non-military citizen of Fairfax.

To put the shoe on the other foot, the legislature should have, but did not, consider the rapid growth of the Arlington, Fairfax and Norfolk areas. If any areas of the state were entitled to greater representation at the beginning of the decennial period, these were the areas because, no matter how fairly apportioned by 1960 population figures, the vote of the citizen of a rapidly growing area is progressively watered down at each election. As happened under the 1952 Apportionment Act, it is likely that by 1972 the disparity between rural districts and suburban districts will be 9 or 10 to 1.

The military argument, the only argument advanced by the state as a reasonable basis for the inequality of treatment accorded appellees, falls of its own weight. The record is devoid of any explanation. The appellees were discriminated against without rhyme or reason.

IV

W.M.C.A., Inc. v. Simon and other lower court cases cited by Appellants are not inconsistent with the opinion below

Appellants rely on district court decisions in Florida, Louisiana, New York and Ohio, and state court decisions from Idaho, Maryland and New Jersey, which denied relief to plaintiffs attacking reapportionment statutes.[6]

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[6] *Sobel* v. *Adams*, 208 F.Supp. 316 (S. D. Fla. 1962). *Caesar* v. *Williams*, Idaho, 371 P. 2d 241 (1962). *Daniel V. Davis*, —— F.Supp. —— (La. 1963). *Maryland Committee for Fair Representation* v. *Tawes*, 229 Md. 406, 184 A.2d 715. *Jackman* v. *Bodine*, 78 N.J. Super. 414, 188 A.2d 642 (1962). *W.M.C.A. Inc.* v. *Simon*, 208 F.Supp. 368 (S.D. N.Y. 1962). *Noland* v. *Rhodes*, —— F.Supp. —— (S.D. Ohio 1963).

The New York and Maryland cases are now on appeal in this Court and appellees in the case at bar associate themselves with the position taken by appellants in those cases. But assuming arguendo that the decisions below in those cases correctly applied the precedent of *Baker* v. *Carr*, supra, they are nevertheless readily distinguishable. In each of them the apportionment plan under attack provided that each county was entitled to representation by itself in at least one House. In the Maryland case, the so called Federal Analogy was applied. In each of the cases malapportionment was something of an historical accident. The situation in Virginia is quite different. There never has been a requirement that each county is entitled to one delegate or one senator. The "Federal Analogy" has no application. Appellees do not, of course, concede that were the State of Virginia at this time to undertake to construct an apportionment system which involved the allocation of one senator or one delegate per county, that it would not be violative of the Equal Protection clause. There would be no historical basis in Virginia for application of the one delegate per county rule or the "Federal Analogy". Such a departure at this time would be patently an excuse to discriminate against populous areas.

The right to vote is a personal right. *United States* v. *Bathgate*, 246 U.S. 220, 227. The injury to the appellees was a personal denial of equal protection of the laws and a personal debasement of their votes as compared with citizens of other counties of the state.

As has been suggested by *amici curiae*, it is common knowledge that the cities contribute a larger per capita share of total state revenues than do rural areas. Likewise, it is everywhere the case that the per capita return to cities is less than the proportionate return to rural areas. Thus, the appellees have suffered a collective in-

jury in that the areas of the state in which they reside, while bearing more than their proportionate share of the costs of the state, have received less from the state in return. As *amici curiae* so ably argue, the debasement of the voting power of urban voters is directly connected with the distribution of state revenues. The inability of urban areas to obtain assistance at state level has led to increasing reliance upon federal aid and a consequent erosion of the federal system. Truly representative state governments responsive to the needs of their citizens can reverse the trend of increasing federalism. Contrary to the fears expressed by appellants,[7] *Baker* v. *Carr*, supra, and the decision of the court below may serve the cause of states rights.

Again, appellants argue that if Virginia discriminates no more against appellees than the electoral college discriminates in favor of the voters of Alaska, there can be no finding of invidious discrimination in Virginia. The electoral college, of course, is an anachronism born of compromise. The Fourteenth Amendment, which came later, prohibits state action, not national. Moreover, the analogy has been rejected by this court. *Gray* v. *Sanders*, 372 U.S. at 378.

V

The doctrine of abstention does not apply to this case

Appellants argue that the District Court should have declined to exercise jurisdiction because the General Assembly of Virginia has followed the constitutional mandate to reapportion following each decennial census.

The answer is that the question before the Court is not whether the General Assembly of Virginia has followed

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[7] "The Tennessee Reapportionment Case." Distributed by the Virginia Commission on Constitutional Government, David J. Mays, Chairman.

the Constitution of Virginia, but whether the apportionment statutes adopted have deprived appellees of equal protection of the laws. When in 1962 the General Assembly undertook the task of redistricting the state, it had before it a plan devised according to methods previously followed in state reapportionments which accorded appellees relative equality. Instead of adopting a carefully constructed plan in which the districts did not vary more than 17% from the ideal in the House and 22% in the Senate, the General Assembly adopted a hastily constructed patchwork plan which devalued the votes of appellees of Fairfax county 4.36 to 1. The question is not of state rights, but of individual rights.

The second argument advanced by appellants in support of their contention that the District Court should have abstained from exercising jurisdiction, is that the appellees have an adquate remedy in the courts of the State. Appellants discuss a case, dehors the record, filed in a state court following the decision of this case below. An examination of the bill of complaint printed in appellants' appendix, shows that the plaintiff in that case prayed an order enjoining the elective officers from conducting a Democratic primary pursuant to the apportionment statutes adopted in 1962. Nomination of candidates in the Democratic primary of Virginia is tantamount to election in most of the legislative districts. Senators nominated in the primary of 1963, whose election will follow as a matter of course in the general election of 1963, will serve until 1968. The 1963 Democratic primary has come and gone without the state court having acted. It is apparent that the plaintiffs in the state court case can take little comfort from that proceeding.

Appellants further cite *Brown* v. *Saunders*, 159 Va. 28,

166 S.E. 105, as evidence that appellees have an adequate remedy under state law. That was a case which arose under the congressional apportionment act of 1932, which failed to comply with Section 55 of the Virginia Constitution, which provides that congressional districts "shall be composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants." It is sufficient to say that there is no similar requirement in Section 43 of the Constitution of Virginia which provides simply: "A reapportionment shall be made in the year 1932 and every ten years thereafter."

Appellants argue thirdly that the courts of the state have not refused to consider relief requested by appellees. It is apparent from the report of *Tyler* v. *Davis*, pending in the Circuit Court of the City of Richmond, that while the court may have considered a request for relief, it granted none.

Appellants argue, fourthly, that section 43 of the Virginia Constitution has not been construed and that a construction is vital to a final determination of the issues presented in this case.

Section 43 goes no further than to require re-apportionment every ten years. The General Assembly has complied with the mandate. The Constitution contains no guide lines. There is nothing in the request for relief of the appellees which requires a construction of Section 43 of the Constitution or Sections 24-14 and 24-12 of the Code of Virginia. There is no ambiguity. No court can read into either of the sections of the code, or Section 43 of the Constitution, the eight additional seats in the General Assembly to which the appellees and their fellow voters are entitled. The question before the court is whether the appellees have been denied the equal protection of the laws in violation of the Federal Constitution. Surely the Federal courts are as

able as the state courts to determine whether the appellees' constitutional rights have been transgressed.

Appellants cite a number of cases in which Federal courts have abstained from exercising jurisdiction. All of the cases preceded *Baker* v. *Carr*. They fall in two classes.

First, those cases in which the Federal courts have delayed the exercise of jurisdiction until an ambiguity in state law has been resolved. E.g. *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207; *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167. This case is not controlled by that line of authority since there was no ambiguity in the statutes or in the Constitution pursuant to which the statutes were passed.

Secondly, are the comity cases under the Due Process clause of the Fourteenth Amendment in which plaintiffs have been remitted to the state courts for the protection of their property rights. E.g. *Martin* v. *Creasy*, 360 U.S. 219; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368. This is not a Due Process case involving a collision between a state's power of eminent domain and the Due Process clause, nor a collision between the police power and the Due Process clause.

The doctrine of abstention has not been applied in reapportionment cases. In *Baker* v. *Carr*. 369 U.S. 186, the Court held that the complainant's allegations of a denial of equal protection presented a justiciable constitutional cause of action upon which the appellants were entitled to a trial and a decision. Nothing in the case of *Scholle* v. *Hare*, 369 U.S. 497, nor the case of *Gray* v. *Sanders*, 372 U.S. 368, suggests that the United States District Court should refrain from hearing complaints in which plaintiffs have invoked the Civil Rights Act to protect their voting strength under the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

Some sixteen cases have been filed, have been tried and have been decided by district courts across the land without the doctrine of abstention having been applied in one case. See: *Sims* v. *Frink*, 208 F. Supp. 431 (M.D.Ala. 1962); *Lisco* v. *McNichols*, 208 F. Supp. 471 (Colo. 1962); *Sincock* v. *Duffy*, 215 F. Supp. 169 (Del. 1963); *Sobel* v. *Adams*, 208 F. Supp. 316 (S.D.Fla. 1962); *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D.Ga. 1962); *Davis* v. *Synhorst*, 217 F. Supp. 492 (S.D.Iowa 1963); *League of Neb. Municipalities* v. *Marsh*, 209 F. Supp. 189 (Neb. 1962); *WMCA, Inc.* v. *Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962); *Lein* v. *Sathre*, 205 F. Supp. 536 (N.D. 1962); *Noland* v. *Rhodes*, —— F. Supp. ——, (S.D.Ohio 1963); *Moss* v. *Burkhart*, 207 F. Supp. 885 (W.D.Okla. 1962); *Nolan* v. *DiSalle* —— F. Supp. —— (S.D.Ohio, June 12, 1963); *Baker* v. *Carr*, 206 F. Supp. 341 (M.D.Tenn. 1962); *Mann* v. *Davis*, 213 F. Supp. 577 (E.D.Va. 1962); *Thigpen* v. *Meyers*, 211 F. Supp. 826 (W.D.Wash. 1962); *Wisconsin* v. *Zimmerman*, 209 F. Supp. 183 (W.D.Wisc. 1962).

Conclusion

The District Court found the 1962 Apportionment Acts of Virginia violative of the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States. The court stayed the execution of its order to give the General Assembly ample time in which to meet and adopt an apportionment standard which met the constitutional requirements. This would have been an easy task since the legislature had before it a plan prepared by an arm of the state in which the deviation from ideal representation did not exceed 17%. The state declined to accept the opportunity.

The court below wisely refused to abstain from a con-

sideration of the important constitutional issues involved. The doctrine of abstention does not apply to voting cases arising under the Equal Protection clause, particularly when there was no ambiguity under either the apportionment acts complained of, or the Constitution pursuant to which the apportionment acts were adopted.

The contention of the state that appellees have an adequate remedy at state law is patently inaccurate. The subsequent suit brought by other voters of Norfolk in a state court to enjoin the putting into effect of the unconstitutional apportionments act failed to accomplish anything.

Neither the federal analogy nor the cases arising in states in which each county has historically been given its own representative in at least one house of the legislature have any bearing on the Virginia case. In Virginia the overriding consideration in past apportionments has been population.

The gross disparity between the voting strength of appellees and citizens of other jurisdictions within the state having been shown, the burden shifted to the state to show some logical explanation for the inequality of treatment. The argument of the state that the legislature might have considered the military population of Arlington, Fairfax and Norfolk was belied by the fact that no similar statistics were introduced for other jurisdictions within the state which also have military populations. No explanation other than the military argument was forthcoming. The District Court was plainly right in ruling that the apportionment acts of Virginia were invidiously discriminatory and deprived the appellees of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Appellees respectfully submit that the decision of the court below should be affirmed. Then, in the event the

General Assembly still declines to act, the District Court will have already before it three alternative plans devised according to the state's criteria. It would be a simple matter to put one of them into effect by decree.

Respectfully submitted,

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